JUN 19 1945
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. 138...

FRANCIS DOLL,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit and

BRIEF IN SUPPORT THEREOF.

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INDEX.

	Page
Petition for Writ of Certiorari	1-10
Summary Statement of Matter Involved	1
Reasons Relied on for Allowance of Writ	6
Prayer for Writ	9
Brief in Support of Petition for Certiorari	11-28
Opinion of Courts Below	11
Jurisdiction	11
Grounds on Which Jurisdiction Is Involved	12
Statement of the Case	14
Specification of Errors	15
Argument	17
1. The Importance of an Authoritative Interpretation and Application of Section 22 (a) of the Revenue Act to Working Partnerships	17
2. The Court Erred in Failing to Give Full Faith and Credit to the Judgment of the Circuit Court of St. Louis County, Missouri	20
3. The Decision Is Contrary to the Decisions of Other Circuit Courts of Appeal in the Same or Similarly Related Partnerships	22
4. The Court Below Should Have Reviewed Questions of Law or Mixed Questions of Law and Fact Appearing in the Opinion of the Tax Court	25
5. The Decision Violates the Fifth Amendment to the Constitution of the United States, in That Petitioner Is Deprived of His Property Rights Without Due Process of Law	27
Conclusion	28

INDEX OF CASES AND STATUTES.

Supreme Court Cases Cited.

Blair v. Commissioner, 300 U. S. 5, 10 ..... 9, 14, 16, 21

Burnet v. Leininger, 285 U. S. 136, 141 ..... 7, 13, 22, 24

Freuler v. Helvering, 291 U. S. 35, 45 ..... 8, 14, 15, 21

Helvering v. Clifford, 309 U. S. 331, 336.....6, 7, 13, 18, 24
Helvering v. Horst, 311 U. S. 112, 119.....7, 13, 18, 24
Helvering v. Tex. Penn Oil Co., 300 U. S. 481, 491....8, 25
Helvering v. Ranken, 295 U. S. 123, 131.....8, 26
Lucas v. Earl, 281 U. S. 111.....7, 12, 13, 18, 22
Sharp v. Commissioner, 303 U. S. 624.....9, 14, 16, 21

Circuit Court of Appeals Cases Cited.

Armstrong v. Commissioner, 143 Fed. (2d) 700 (10th) 8, 13, 15, 22
Bowers v. New York Trust Co., 9 Fed. (2d) 948 (2nd) 8, 13, 15, 24
Commissioner v. Giannini, 129 Fed. (2d) 638 (9th) 8, 13, 15, 24
Commissioner v. Montgomery, 144 Fed. (2d) 313 (5th) 8, 13, 15, 23
Commissioner v. Olds, 60 Fed. (2d) 252 (6th)..8, 13, 15, 22
Champlin v. Commissioner, 71 Fed. (2d) 23 (10th) 8, 13, 15, 23
Hall v. Burnet, 54 Fed. (2d) 443 (C. C. A. D. C.) 8, 13, 15, 23
Humphreys v. Commissioner, 88 Fed. (2d) 430 (2nd) 8, 13, 15, 23
Kell v. Commissioner, 88 Fed. (2d) 453 (5th)...8, 13, 15, 24
Rose v. Commissioner, 65 Fed. (2d) 616 (6th)..8, 13, 15, 23
United States v. Pierce, 137 Fed. (2d) 428, 431 (8th)..16, 26

Statutes Cited.

28 U. S. C. 347 (a) (Jud. Code, Sec. 240 Amended)...6, 11
26 U. S. C. 1141 (53 Stat. 164).....6, 11
26 U. S. C. Internal Revenue Acts, Sec. 22 (a), pages 825, 1008, Internal Revenue Acts, 1936 and 1938..6, 12, 15

Citations to Constitution of United States.

Article IV, Sec. 1.....8, 21
Fifth Amendment 9, 16, 27

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To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case challenges the opinion and judgment of the United States Circuit Court of Appeals, Eighth Circuit (R. 140), affirming the judgment of the Tax Court of the United States, 2 T. C. 276 (R. 34), styled as above and not as yet reported, denying refunds to petitioner for overpayments of income tax for the years 1937, 1938 and 1939.

The case involves a partnership started in 1932 between petitioner and his wife, wherein the judgment complained of taxes all the income thereof to petitioner as his personal earnings, when both parties, working through the years, brought up the business from a small beginning to one of considerable proportion.

Petitioner complains of the interpretation of Sec. 22 (a) of the Revenue Acts of 1936 and 1938, 26 U. S. C. A., Internal Revenue Acts, pages 825, 1008, defining gross income, as set forth in the opinion of the Circuit Court of Appeals as applied to these facts.

The case involves a failure to give full faith and credit to the declaratory judgment of the Circuit Court of St. Louis County, Missouri, setting forth the property rights of the partners, contrary to Article IV, Section 1, of the Constitution of the United States.

Prior to 1932 the petitioner was in business with his brother Antonio Doll, in Cuba, selling shoes (R. 52). Due to a political uprising, he came to the United States, became a citizen and married (R. 47). In view of conditions in Cuba he had to look for other markets (R. 47). The latter part of 1932 he went to Puerto Rico to find out the kind of shoes merchants were buying, and found it was impossible to cover that territory without help, and on December 15, 1932, formed a partnership with his wife as she was continually working with him (R. 48, 53, 61). He and his wife drafted and typed the agreement, using the name St. Louis Trading Company (R. 89, Pet. Exhibit 4), without outside advice (R. 68). Their business was selling American made shoes on a purely commission basis, paid by the various manufacturers, and the partnership paid their own expenses (R. 48, 49). No stock was kept on hand, only samples (R. 65).

After the political situation settled down in Cuba, he then went back to Cuba on trips to sell shoes (R. 48). His wife accompanied him on several trips to Cuba and Puerto

Rico, and assisted him (R. 48, 55), keeping records and writing orders. Mr. Mitchell, his wife's brother, was with the company for a while, trying to develop Puerto Rico on St. Louis beer, but this did not last long and never earned any money (R. 53).

A bank account was opened in the name of St. Louis Trading Company at the start of the partnership (R. 53) and still exists in that name, and all checks received are deposited in that account (R. 56). During 1937 to 1939 the business office was at 1515 Washington Avenue, St. Louis, Missouri (R. 49), and the telephone was in the name of the company (R. 56), and during those years commissions were received from forty-six (46) different manufacturers (R. 80). Checks were received payable to F. Doll, Francis Doll or St. Louis Trading Company (R. 49, 69, 81). Most of the agreements with manufacturers were oral, except one with Hamilton-Brown Shoe Company (R. 49, Resp. Exhibit D 119). The International Shoe Company, St. Louis, was aware of the existence of the partnership St. Louis Trading Company, and had dealt with them since 1932 (R. 70); likewise Brauer Bros. Shoe Company (R. 81). By agreement, the wife was to draw a salary of two hundred dollars a month (R. 48) as part of her portion, but there was never just two hundred dollars drawn out (R. 60, 61). The wife kept the records and books, took care of the correspondence, all of the filing of statements and invoices, wrote up orders, and when petitioner was away from home, took care of all customers coming to St. Louis, conducted them to factories, saw that the merchandise sold was shipped, made reservations for them, entertained them, and when petitioner was with customers, took care of the office (R. 56, 57, 58), and spent whatever time was necessary in the office. In addition, when foreign buyers arrived and petitioner was away, the wife secured an interpreter and conducted them to the different manufacturers and introduced them. She never sold shoes at such times because the house salesmen were

there to wait on customers that were brought in (R. 62, 65). These foreign buyers came to petitioner's home and were kept there and were entertained by his wife (R. 62). The entertainmnt and guiding of foreign buyers is an important part of the business of selling foreign buyers for export (R. 66, 70, 71).

The petitioner stated that hard work by him and his wife was what brought the business (R. 55).

In the account book all commissions received were entered under "cash received" column by items (R. 58). Every check written was on the expenditure page, which showed "To Francis Doll, personal," and "To Cornelia Doll, personal," or "To Francis Doll and Cornelia Doll, jointly" (R. 64).

The wife was authorized to write checks on the company account, and did so at first, but stopped that practice as it was not satisfactory for both parties to write checks, especially when petitioner was away on a trip (R. 61).

On October 23, 1941, Cornelia Doll, wife of petitioner, filed a suit in the Circuit Court of St. Louis County, Missouri, against petitioner, for a declaratory judgment to construe and determine her property rights under the partnership agreement, as she wanted to know what her rights were as a wife and as a partner because the Government was not recognizing the partnership (R. 67-94). Such suit showed the net income of the partnership for the year 1933 to be very small, $2,366.31, but increasing each year until the year 1940, when the net income was $19,347.85, and also showed that through the years Cornelia Doll had drawn out $19,008.02 and that petitioner had drawn out $18,506.70 (R. 98, 99). Thereafter a judgment was rendered in said court adjudging Cornelia Doll and petitioner equal partners, setting forth the amounts each had drawn individually, the amounts drawn jointly, the purchase of a home in the names of Cornelia Doll and petitioner from partnership funds, the amount due petitioner to make said with-

drawals equal, together with the amount still on hand in the partnership account (R. 105-110).

Neither petitioner nor his wife were familiar with income tax law or requirements and made their original returns on the advice of a bookkeeper, not an expert accountant. For the tax years involved this bookkeeper made out their separate returns executed by petitioner and his wife (R. 47-68). Petitioner's returns were made out, "Francis Doll trading as St. Louis Trading Company," for the years in question (113, 115, 117, Resp. Exhibits A, B, C), showing entire income of the business as his (R. 43). In 1940 an expert accountant was consulted by petitioner in connection with claims for social security taxes, and an examination of the books and business brought to the accountant's attention the partnership agreement (R. 45). The accountant prepared and filed amended returns for petitioner for the years in question (R. 43, 44, 45, Pet. Exhibits 1, 2, 3, R. 83, 85, 87). Deficiencies were assessed and requests for refund were denied by the Commissioner (R. 15-20). Petition for review was filed with the Tax Court June 13, 1941, within the time provided by law (R. 4). The Tax Court affirmed the Commissioner (R. 23-34) on June 25, 1943. On September 3, 1943, within the time provided by law, petition for review by the Circuit Court of Appeals for the Eighth Circuit was filed (R. 35). Thereafter the matter was argued and submitted to the latter court, which rendered its opinion and judgment on April 24, 1945 (R. 140-151). Motion for rehearing was duly filed May 7, 1945 (R. 153), and denied May 11, 1945 (R. 167). Within the time provided by law, on May 21, 1945, petitioner filed his motion to stay mandate for purpose of filing application for writ of certiorari to this Court (R. 167). On May 25, 1945, order staying issuance of mandate was entered staying mandate for thirty days (R. 168), provided a certificate from Clerk of the Supreme Court was filed with Clerk that

such petition had been filed, within said period, and said stay to continue until final disposition by Supreme Court.

In its opinion the Court held:

1. That the partnership was proper under Missouri law.

2. That it was not necessary to pass on the force of the Circuit Court judgment.

3. That from an analysis of "all the circumstances attendant on its creation and operation" (Helvering v. Clifford, 309 U. S. 331, 335, 60 Sup. Ct. 554, 84 L. Ed. 788), "there was no substantial change in petitioner's economic position" (Clifford case, page 336), and that petitioner was therefore taxable for all the partnership income.

This is a petition for certiorari to review said opinion and judgment under authority of 28 U. S. C. 347 a (Jud. Code, Sec. 240 Amended), and 26 U. S. C. 1141 (53 Stat. 164).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. This case presents questions of the first importance relating to partnerships of husband and wife, where each worked since the formation of the partnership, as to the interpretation of Sec. 22 (a) of the Revenue Act as applied to such working partnership, and which has not heretofore been passed on by this Court. Section 22 (a) of the Revenue Act is as follows:

> "Sec. 22. **Gross income.**
>
> "(a) General definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or deal-

> ings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

An authoritative decision on the question by this Court is of great importance, not only to this petitioner but to the Federal Government, as well as to the numerous business partnerships of husband and wife and children now existing in this country. This is evidenced by the many divergent opinions of the Tax Court and the various Circuit Courts of Appeal where family relations are involved as to whom the income is taxable.

2. The opinion and decision has decided this important question of law and its application in a way that is probably untenable under decisions of this Court. We refer to:

> Lucas v. Earl, 281 U. S. 111, 50 S. Ct. 241, 74 L. Ed. 731;
> Burnet v. Leininger, 285 U. S. 136, 141, 52 S. Ct. 345, 76 L. Ed. 665;
> Helvering v. Horst, 311 U. S. 112, 119, 61 S. Ct. 144, 85 L. Ed. 75;
> Helvering v. Clifford, 309 U. S. 331, 336, 60 S. Ct. 544, 84 L. Ed. 788.

It should be decided by this Court whether the general interpretations taken by the Circuit Court of Appeals from the above cases should be applied to working business partnerships of husband and wife or children, such as was done in the opinion of the court.

3. The decision is in conflict with those of other Circuit Courts of Appeal as to whom such income is taxable in partnership and similar cases wherein it was held that the

rule as set out in Lucas v. Earl, supra, and Burnet v. Leininger, supra, did not apply, as follows:

Commissioner v. Olds, 60 Fed. (2d) 252 (6th);
Armstrong v. Commissioner, 143 Fed. (2d) 700 (10th);
Champlin v. Commissioner, 71 Fed. (2d) 23 (10th);
Hall v. Burnet, 54 Fed. (2d) 443 (C. C. A. D. C.), certiorari denied 285 U. S. 552;
Rose v. Commissioner, 65 Fed. (2d) 616 (6th);
Humphreys v. Commissioner, 88 Fed. (2d) 430 (2nd);
Commissioner v. Montgomery, 144 Fed. (2d) 313 (5th);
Commissioner v. Giannini, 129 Fed. (2d) 638 (9th);
Kell v. Commissioner, 88 Fed. (2d) 453 (5th);
Bowers v. N. Y. Trust Co., 9 Fed. (2d) 548 (2nd) (decided prior to Lucas v. Earl).

4. The Circuit Court of Appeals also clearly erred in its opinion by holding that the various ultimate conclusions and questions involved were restricted for their review (R. 151), contrary to applicable decisions of this Court holding that ultimate conclusions and questions involved in such cases were questions of law or mixed questions of law and fact, which decisions, among others, are as follows:

Helvering v. Tex. Penn Oil Co., 300 U. S. 481, 491, 57 S. Ct. 569, 81 L. Ed. 755;
Helvering v. Ranken, 295 U. S. 123, 131, 79 L. Ed. 343, 55 S. Ct. 732.

5. The decision, to the extent that it fails to accord full faith and credit to the judgment of the Circuit Court of St. Louis County, Missouri, contrary to Article IV, Section 1, of the Constitution of the United States, is probably in conflict with applicable decisions of this Court, in the following cases, among others:

Freuler v. Helvering, 291 U. S. 35, 45, 54 S. Ct. 308, 312, 78 L. Ed. 634;

Blair v. Commissioner, 300 U. S. 5, 10, 81 L. Ed. 465, 469, 57 S. Ct. 330;
Sharp v. Commissioner, 303 U. S. 624, 54 S. Ct. 748, 82 L. Ed. 1087.

6. The opinion of the Court of Appeals having held that the parties had a right to contract and enter said partnership, and having failed to give it any force or effect, denied petitioner the rights to which he was entitled under the contract and the facts, contrary to the Fifth Amendment to the Constitution of the United States, in that petitioner is hereby deprived of his property rights without due process of law.

In the interest of brevity (Sup. Ct. Rule 38, p. 2) petitioner is not setting forth all the points which will be presented and urged at the argument on the merits of the case, should this Court see fit to grant the writ; but in order to comply with the rule of this Court which requires that all issues upon which decision is requested be set forth in the petition for certiorari (Ganning v. Cooley, 281 U. S. 90, 98), your petitioner here refers to and incorporates into this petition all of the matters presented in his assignment of errors on the appeal to the United States Circuit Court of Appeals, Eighth Circuit (R. 39), with the same force and effect as if set out in full herein.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court for its review and determination a transcript of the record and proceedings in the case on its Docket No. 127,773, Francis Doll, Appellant, v. Commis-

sioner of Internal Revenue, Respondent; and that the decision and judgment of said Court be reversed; and for such further orders as may seem meet and proper.

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